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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No. 222

W. J. KIRKPATRICK,
Appellant,
vs.
J. ALICE STELLING,
Appellee.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

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PREFATORY STATEMENT.

The "Jurisdictional Statement" filed by appellant herein pursuant to Rule 12 of this Court shows that this case is one technically within the requirements of Section 237 (a) of the Judicial Code. The validity of the state statute, Section 580a of the California Code of Civil Procedure, was challenged in the state Courts under specific provisions of the federal Constitution and statutes, as set forth in said "Statement". The validity of said statute was sustained against that

attack. Appellant raises questions which are questions of first impression and which are new. There appears to be no prior decision of this Supreme Court upon the subject. The federal questions involved are substantial, and are of serious and widespread public importance, as shown by the "Jurisdictional Statement".

JURISDICTION TACITLY CONCEDED BY APPELLEE.

Appellee moves to dismiss this appeal for want of jurisdiction because, as she asserts in the first paragraph of her motion, the decree appealed from is that of the District Court of Appeal of the State of California. If appellee's contention is that there may not be an appeal from any state Court, it is a complete answer thereto merely to cite said Section 237 (a) of the Judicial Code. But if appellee means that the decision herein is not a final decision, because the Supreme Court of California is the highest Court in California, and the decision is not by that Court, the contention is without merit, for the reason that the record in two places (see Typewritten Record herein, p. 10, lines 22 and 23, and p. 61), shows that the Supreme Court of California denied a hearing herein. Therefore, under the cases cited (R. p. 10, lines 26 and 27), the decision herein of the District Court of Appeal became a final decision sixty days after its rendition, from which an appeal lies to this Court within three months thereafter. An additional apt authority on this point is

Terry v. Southern Pacific, 176 Cal. 184.

However, appellee in the second paragraph of her motion exhibits a waning confidence in said point and appears to tacitly admit this Court has jurisdiction hereof, stating:

> "* * * *although the record in the said cause may show that this Court has jurisdiction* in the premises yet it is manifest that said appeal is without merit * * *" (Our emphasis.)

APPELLEE FAILS TO NEGATIVE APPELLANT'S CONTENTION THAT THIS IS A CASE OF FIRST IMPRESSION IN THIS COURT.

If the points raised by appellant herein, particularly with respect to the meaning and effect of the tender clause set forth in Article I, Section 10, of the federal Constitution, had heretofore been decided by this Court, and if appellee could point out some prior decision upon the subject adjudicating it adversely to appellant herein, appellee's statement would be of some assistance to this Court and perhaps aid it in disposing of this case. But appellee has utterly failed to do this, although challenged by appellant at the very outset of his "Jurisdictional Statement", with the result that the only decision that appellee is able to cite upon this subject is that of the state Court below which is herein appealed from, and consequently not determinative. Indeed, that the point made by the appellant under the tender clause herein is undecided by this Court, is conceded by the learned author of the opinion of the Court below, viz.:

> "* * * It is true that we have been referred to no case in a state or federal court, and independent research has disclosed none, that directly passes on the question as to whether such legislation violates the tender clause."
>
> *Kirkpatrick v. Stelling,* now officially reported, 36 Cal. App. (2d) 658, at 671.

The only case wherein a tender and appraisal statute has been assailed under the tender clause is that of *Baily v. Gentry,* 1 Mo. 164, 13 Amer. Dec. 484, and it is important here to emphasize that the Missouri tender law was there held repugnant to the tender clause of the federal Constitution.

THE DECISION OF THE COURT BELOW IS NO ANSWER TO APPELLANT'S CONTENTIONS.

Appellee's statement of grounds making against the jurisdiction of this Court is substantially nothing but a verbatim copy of the opinion of the Court below. But the opinion does not even discuss the following federal points raised by appellant to the effect that Section 580a is repugnant to:

1. The grant to Congress of *power* to determine what shall be money and what shall pay money obligations, debts. (R. p. 13, lines 5 and 6.) See, also, Assignment of Error No. 3. (R. p. 2, lines 2 to 5.)

2. The federal statutes enacted pursuant to that grant of power and providing what shall pay money obligations; what shall be a tender "in payment of *all*

debts, public and private, within the United States". (R. p. 13, lines 8 to 24.) Assignment of Error No. 4. (R. p. 2, lines 6 to 15.)

3. The grant, those federal statutes, the tender prohibition, and the other two prohibitions, in association and combination, establishing a national policy of exclusive authority over the medium for paying *all* debts within the United States (R. p. 13, lines 2 to 7), and Story, Sec. 1372, quoted in opinion; Assignment of Error No. 7. (R. p. 3, lines 4 to 8.)

Let us note what Justice Washington in *Ogden v. Saunders,* 12 Wheat., p. 265, states is obvious in this regard:

> "* * * It declares, that 'no state shall coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts'. These prohibitions, associated with the powers granted to Congress 'to coin money, and to regulate the value thereof, and of foreign coin', *most obviously* constitute members of the same family, being upon the *same subject,* and governed by the same policy." (Our italics.)

Accordingly, the grant to Congress of the power to issue money and make it a tender in payment of all debts within the United States, and the statutes so providing, are violated by said Section 580a; and that is true even if there were no tender prohibition on the states. The point is stated by Madison in the Federalist, No. 44:

> "The *power* to make anything but gold and silver a *tender in payment of debts,* is withdrawn

> from the states on the *same principle* with that of issuing *paper currency.*" (Our italics.)

The national government, then, has *power* to provide, and *has* provided, what shall be the medium or tender for the payment of all debts, existing and future, secured or unsecured, within the United States. The states have no power to provide what may be a tender or medium for paying any debt, existing or future, secured or unsecured, within the United States.

The opinion below, however, does discuss the points raised by appellant under the tender clause and XIV Amendment at quite some length. But it is respectfully asserted that it does not answer these contentions. Thus while *the opinion below expressly recognizes that the tender clause is broad enough to invalidate state statutes which require the discharge, even in part, of unsecured obligations through the medium of Court, jury, or other official appraisals* (*Kirkpatrick v. Stelling,* 36 Cal. App. (2d) at 665), it holds that the tender clause can have no such force or effect where such legislation is made to apply only to secured debts; e.g., debts secured by real property. In short, the opinion below is the first instance, covering a period of a century and a half, so far as research of counsel for the parties discloses, wherein any Court has held that the tender clause is limited, in its application, to *unsecured* obligations! It thus appears that the Court below for the first time in the constitutional history of this country has written into the tender clause of

the federal Constitution a drastic limitation upon its application and effect which is unsupported by either the text of the clause itself, or the decisions of this Court.

Thus, the opinion below interpolates into the tender clause the word "unsecured" before the word "debts". That is contrary to the definition of debts, as understood both when the Constitution was written and today:

> "*Debts.* A sum of money due by certain and express agreement. 3 Bl. Com. 154." (Bouvier.)

The decision is also contrary to the following principles announced in *Home B. & L. v. Blaisdell,* 209 U. S. at p. 426:

> "When the provisions of the Constitution, in grant or restriction, are specific, so particularized as *not to admit of construction,* no question is presented. Thus emergency would not * * * permit the States to 'coin money' or to 'make anything but gold and silver coin a tender in payment of debts'. But where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. That is true of the contract clause." (Our italics.)

and *United States v. Sprague,* 282 U. S. 716 at p. 731, 75 L. ed. 640 at p. 644:

> "The Constitution was written to be understood by the voters; its words and phrases were used in

> their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for *construction* and no excuse for *interpolation* or addition." (Our italics.)

To further sustain its conclusion on the applicability of the tender clause, the Court below primarily relied upon three cases, to-wit:

> *Richmond Mortgage & Loan Corp. v. Wachovia B. & T. Co.*, 300 U. S. 124;
> *Honeyman v. Jacobs*, 306 U. S. 539;
> *Suring State Bank v. Giese*, 246 N. W. 556.

But it should be a complete answer to point out that in none of these cases was the tender clause cited or considered, and that consequently none of these cases are decisive upon the tender clause point raised in the instant case. The *Wachovia* and *Honeyman* cases involved the *contract clause*—not the tender clause, nor any of the other five clauses involved herein.

Even the *Suring State Bank* case did not attempt to hold that a state could force a discharge of a pecuniary obligation by something other than money, such as property or a valuation upon property. It merely recognized an old procedure often exercised by a Court of Equity in foreclosures, whereby the Court, prior to a foreclosure sale, fixed a minimum price as a condition to confirmation of the sale. The decision there did not compel the creditor to accept the minimum price so fixed as a payment in full of his obligation. On the

very contrary, it *reversed* the judgment of the lower Court because it purported to do so.

THE ONLY FEDERAL CASE CITED BY APPELLEE SUPPORTS APPELLANT.

Appellee in her statement has cited but two cases in addition to quoting the opinion below, to-wit:

Helvering v. Midland Mutual Life Ins. Co., 300 U. S. 216;

Suring State Bank v. Giese, 246 N. W. 556.

Appellant has just pointed out that the *Suring State Bank* case did not involve the tender clause and the other clauses involved herein; is not in point; and, indeed, reversed the judgment of the lower Court in so far as it attempted to compel a creditor to accept less than was due him, without his consent.

In *Helvering v. Midland Mutual Life Ins. Co.*, supra, this Court did not hold, as appellee appears to infer, that where property is bid in or purchased at a foreclosure sale by a creditor, on the one hand, or a stranger, on the other, at a figure less than the full amount due on the debt, the full obligation is discharged by such partial payment. On the contrary, this Court declared through Mr. Justice Brandeis:

> "If the bid had been insufficient to yield full payment of the mortgage debt, principal and interest, *the company would have been entitled to a judgment for the deficiency.*" (p. 226.) (Our italics.)

Furthermore, this Court in that case established the very proposition for which appellant contends—and which, practically speaking, is the crux of this case—that *the actual amount bid or paid* at a foreclosure sale *rather than a theoretical market value obtained by appraisal,* is the only amount which *is* paid upon the obligation, and consequently the figure which should govern. Said the Court there:

> "At best, evidence of value is largely a matter of opinion, especially as to real estate." (p. 225.)

Citing:

Montana Ry. Co. v. Warren, 137 U. S. 348, 353.

CONCLUSION.

That the contentions of appellant herein are not fantastic is evidenced, among other things, by the fact that the Supreme Court of Missouri upheld a similar contention under the tender clause in *Baily v. Gentry,* supra, and that the Court below devoted many pages to its consideration and treatment of certain of appellant's contentions.

It would seem clear that an appeal lies herein; that the grounds are substantial and important; that Congress, within the limits of the Constitution, has, and should have, exclusive legislative power over money and the medium for paying all debts; and that, in the words of Justice Story,

"* * * no state legislature can provide that future pecuniary contracts may be discharged by anything but gold and silver coin." (Sec. 1372.)

It is respectfully submitted that the Court has jurisdiction in the case, and the motion to dismiss or affirm should be denied.

Dated, San Francisco, California,
July 3, 1940.

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